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In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

FERNANDO ROJAS-CONTRERAS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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32 pp

QUESTIONS PRESENTED

1. Whether the defense preparation period provision of the Speedy Trial Act, 18 U.S.C. 3161(c)(2), prohibits commencement of trial within 30 days of a defendant's arraignment on a superseding indictment when a defense preparation period of 30 days has been allowed following arraignment on the original indictment.

2. Whether, in the circumstances of this case, any violation of Section 3161(c)(2) was harmless.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is unreported. The district court's oral ruling denying respondent's motion for a continuance (App., *infra*, 3a-4a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1984. A timely petition for rehearing was denied on September 26, 1984 (see App., *infra*, 5a). On November 17, 1984 Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including December 26, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Speedy Trial Act provides in pertinent part (18 U.S.C. 3161(c)(2)):

> Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, respondent, a Mexican citizen, was convicted of illegal entry into the United States having been convicted previously of the same offense, in violation of 8 U.S.C. 1325. He was sentenced to a term of imprisonment of one year and one day. The court of appeals reversed on Speedy Trial Act grounds.

1. The evidence at trial showed that respondent is a citizen of Mexico and not a United States citizen. On December 7, 1981, respondent was convicted of illegal entry into the United States and was sentenced to one year's imprisonment. After serving his sentence, he was returned to Mexico (Tr. 256-257).

Thereafter, at approximately 4:00 a.m. on February 13, 1983, respondent entered the United States on foot, five miles east of the Chula Vista official point of entry. He carried no immigration documents with him. Respondent walked north along a flat mesa, crossed the Otay River, and stopped to rest on the southwest bank of Otay Lake. At 9:30 a.m., Border Patrol Agent William Harris found respondent and another alien sitting along the bank. Five other aliens were hiding nearby under a sheet of plastic. Each

member of the group had muddy shoes and grass and straw in his hair, indicating that the group had just hiked from the border. Agent Harris asked the group if they were from Mexico, to which they replied, "yes." Tr. 156-166, 181, 186-192, 262.

Agent William Burt arrived at the scene and recognized respondent as someone he had arrested before. Respondent was taken to the Brown Field Station, and after waiving his *Miranda* rights, he agreed to talk to Agent Burt. Respondent identified himself as "Santiago Montano Meneses." He admitted that he had entered the United States that morning five miles east of the official port of entry and that he carried no documents entitling him to enter the United States. He further admitted that he had a prior arrest record for illegal entry. Respondent signed a voluntary departure form acknowledging that "I am illegally in the United States." Tr. 189-193, 209-217.

That night, after again waiving his *Miranda* rights, respondent told Border Patrol Agent Ted Stark that his name was in fact Fernando Rojas-Contreras, and that he had previously been convicted of and had served time for illegal entry. He also acknowledged that he had been sent back to Mexico upon his release from prison and that he had reentered the United States through the hills south of Otay Lake early that morning. Tr. 259-265.

2. On February 18, 1983, a federal grand jury sitting in the Southern District of California returned a two-count indictment charging respondent with felony illegal entry, in violation of 8 U.S.C. 1325, and reentry by a deported alien, in violation of 8 U.S.C. 1326. The indictment stated that the judgment of conviction for the prior illegal entry,

which formed the predicate for the Section 1325 offense, was "rendered on or about December 17, 1981" (E.R. 4).[1] Respondent was arraigned on the two-count indictment on February 18, 1983. Trial was thereafter scheduled for April 19, 1984.

The date of the predicate conviction (actually December 7, 1981) was misstated by ten days in the February 18 indictment as a result of a typographical error (Tr. 15). It is undisputed that, on March 21, 1983, the respondent was provided with discovery by the government that disclosed the correct date of the predicate conviction (Tr. 15, 24).[2] On April 15, 1983, the grand jury returned a superseding indictment correcting the typographical error in Count

[1] "E.R." denotes the excerpt of record prepared by respondent's counsel and filed in the court of appeals. Count One of the February 18 indictment charged, in its entirety (E.R. 3-4):

> On or about February 13, 1983, within the Southern District of California, defendant FERNANDO ROJAS-CONTRERAS, who was then and there an alien, did knowingly and unlawfully enter the United States from Mexico at a point near San Ysidro, San Diego County, California, which said time and place were then and there other than as designated by immigration officials of the United States for the entrance of immigrants into the United States; that before the commission of the offense hereinbefore set forth, said defendant was, in the United States District Court for the Southern District of California, convicted of the crime of illegal entry, and the judgment was pronounced and rendered on or about December 17, 1981; in violation of Title 8, United States Code, Section 1325.

[2] It also appears that respondent was represented in the first prosecution by counsel associated with the Federal Defenders of San Diego, Inc., which also supplied his counsel in connection with the present prosecution (Tr. 21-22).

One by changing "17" to "7." The superseding indictment charged the same two offenses as the original indictment; indeed, it was in all other respects word for word the same as the original indictment (See E.R. 6-7). Respondent was arraigned on the superseding indictment on April 18, 1983 (Tr. 5-6).

2. At a pretrial conference later on April 18, 1983, defense counsel made an oral motion for a 30-day continuance of the trial scheduled to commence the next day. He argued that, under Section 3161(c)(2) of the Speedy Trial Act, as interpreted by the Ninth Circuit in *United States* v. *Arkus*, 675 F.2d 245 (1982), a defendant has an absolute right to a new 30-day trial preparation period following the return of a superseding indictment, even though the statutory trial preparation period has already been allowed following the original indictment. Defense counsel asserted (Tr. 6) that *Arkus*

> holds once there is a rearraignment I have an automatic, if I so claim it, 30-day period. In fact, it's only to be excused if there's an express waiver of counsel. And so therefore under the statute and under *Arcus* [*sic*], I would make that demand.

Defense counsel simply relied on *Arkus*, which he described as "rather clear-cut on the interpretation of 18 U.S.C. 3161(C)(2)" (Tr. 9). He did not claim that respondent was in any respect prejudiced by the alteration in the date of the predicate offense accomplished by the superseding indictment, and he did not deny that he had been advised of the typographical error in the original indictment well in advance of the scheduled trial date. Respondent's counsel did argue that he needed additional time to consult a finger-

print expert and to review respondent's immigration ("A") file, but he did not claim that these tasks had anything to do with the change in the indictment. Review of the immigration file, counsel stated, was necessary to defend the illegal entry violation charged in Count Two; the fingerprint expert was needed to determine whether respondent was the same person convicted of illegal entry on December 7, 1981. Tr. 10-12.

Citing the Seventh Circuit's decision in *United States* v. *Horton*, 676 F.2d 1165 (1982), cert. denied, 459 U.S. 1201 (1983), and seeking to distinguish *Arkus* on factual grounds, the government disputed that the Speedy Trial Act required a new 30-day defense preparation period following the return of a superseding indictment in the circumstances of this case (Tr. 15-16, 17, 18-19). With respect to the practical justifications given by respondent for a continuance, the government pointed out that its own fingerprint expert had not yet compared respondent's prints to the prints of the person convicted on December 7, 1981, but that he planned to do so the following morning. The court ordered the government to have its expert contact defense counsel with the results of the analysis as soon as he had completed the task (Tr. 26-27). Ultimately, however, respondent agreed to stipulate that he was indeed the person convicted of illegal entry on December 7, 1981, thereby making unnecessary expert testimony as to respondent's identity (Tr. 61, 256-257). In order to moot respondent's plea that he could not defend the charge in Count Two until he had reviewed the immigration file, the government offered to dismiss Count Two and to proceed to trial the next day on Count One alone. The court conditioned its denial of

respondent's continuance motion upon dismissal of Count Two (Tr. 18, 23, 25-26).

In denying respondent's motion for a 30-day continuance, the district court relied substantially on the Seventh Circuit's decision in *Horton* and distinguished *Arkus* on factual grounds (Tr. 23-25). The court also emphasized that respondent was not in any respect prejudiced by being required to go to trial on the superseding indictment (Tr. 24-25):

> [T]he first issue before the court is whether or not there is any prejudice that has been shown by virtue of him going to trial on the superceding [*sic*] indictment on which he was just arraigned this morning. In other words, is the change of date in Count 1 so significant and causes a significant problem. I see none.
>
> To the extent that it appears that the discovery was very clear, the date that was being discussed is the date of the indictment, and therefore certainly the basis for their felony, and the prior act was clear from the discovery and clear from the inception. So it was a ministerial act to correct a date error where a "1" had been inserted in error, and that has been corrected by the superceding [*sic*] indictment. So I find that there has been no change—I mean, no prejudice from the superceding [*sic*] indictment.

3. The court of appeals reversed, holding that under its decision in *United States* v. *Harris*, 724 F.2d 1452 (1984), which in turn relied on *Arkus*, respondent was entitled to a new 30-day defense preparation period following his arraignment on the superseding indictment (App., *infra*, 2a). The court of appeals rejected the government's argument that, because the superseding indictment merely corrected a typo-

graphical error of which defense counsel was already aware, no new defense preparation period was required. The court commented only on the government's observation that the original indictment could have been amended without resubmitting the case to the grand jury, describing this circumstance as "immaterial," and stating (App., *infra*, 2a): "It was the government who chose to proceed by way of reindictment." Finally, citing its decision in *United States* v. *Daly*, 716 F.2d 1499, 1506 (1983), the court of appeals held that reversal of respondent's conviction was the automatic consequence of the Speedy Trial Act violation (App., *infra*, 2a):

> [A]ny pretrial preparation period shorter than thirty days is inadequate *per se*. No showing of prejudice is required.

4. The government filed a petition for rehearing and suggestion of en banc review.[3] One or more active members of the court requested a poll of the full court, but the suggestion for rehearing en banc was rejected by a majority vote (App., *infra*, 5a).

REASONS FOR GRANTING THE PETITION

This case presents a question of considerable practical importance for the administration of the Speedy Trial Act and the effective management of the substantial criminal dockets of the United States District Courts. The decision of the court of appeals is contrary to the pertinent language of the Speedy Trial Act and contrary to the decisions of every other

[3] A short time earlier the government had filed a petition for panel rehearing in *Harris*, which thereafter was denied.

court of appeals to consider the question presented—by now a total of four circuits. It injects a wholly irrational requirement of delay that defeats the congressional policy underlying the Speedy Trial Act and could not possibly have been intended in cases like this. Further review is warranted here.

1. a. As originally enacted, Title I of the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, established only outside time limits within which a criminal case must be tried. See 18 U.S.C. (1976 ed.) 3161(c). Generally speaking, the rule established by the *speedy* trial provisions of the Act is that trial must commence witnin 70 days following indictment or arraignment, whichever occurs later. 18 U.S.C. 3161(c)(1). However, in counting the 70 days, time elapsed during various predictable and unpredictable pretrial proceedings is to be excluded. 18 U.S.C. 3161(h). The Act set no limit on the degree of expedition permitted.

In 1979, however, Congress amended the Act to "assure[] the defendant some minimal time to prepare." S. Rep. 96-212, 96th Cong., 1st Sess. 32 (1979). See *United States* v. *Mers*, 701 F.2d 1321, 1333 (11th Cir. 1983). Except in cases where "the defendant consents in writing to the contrary," Section 3161(c)(2), added by the 1979 amendments, prohibits the commencement of trial "less than thirty days from the date on which the defendant *first appears through counsel* * * *" (emphasis added). Thus, under the language of the statute, the mandatory 30-day trial preparation period began for respondent on February 18, 1983, and ended on March 20, 1983. See *United States* v. *Darby*, 744 F.2d 1508, 1520 (11th Cir. 1984) ("When employing the term

'first,' Congress presumably did not have *subsequent* appearances in mind [emphasis in original].").

There is nothing in either the statute or its legislative history that supports the court of appeals' holding that a new 30-day defense preparation period must be allowed following a defendant's arraignment on a superseding indictment. See generally, A. Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, at 69-75 (Fed. Judicial Center 1980). Indeed, examination of other provisions in the Act confirms that Congress did not intend the return of a superseding indictment automatically to trigger a new defense preparation period. As the Seventh Circuit noted in *United States* v. *Horton*, 676 F.2d 1165, 1169 (1982), cert. denied, 459 U.S. 1201 (1983), Section 3161(d)(1) provides that when an indictment is dismissed "upon motion of the defendant" and a subsequent indictment is filed charging the defendant with the same offense or a related offense, the constraints governing the timing of trial established by Section 3161(c) take effect with respect to the subsequent indictment. Thus, when reindictment follows grant of a defendant's motion to dismiss, the government is allowed a new period of 70 nonexcludable days to bring the defendant to trial and the defense is afforded a new 30-day trial preparation period. By contrast, Section 3161(d)(1) makes no provision for restarting of the Speedy Trial Act time limits when a superseding indictment is returned and the government voluntarily dismisses an earlier indictment,[4] and no other provision of the Act provides for a new 30-day period in that situation.

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[4] It is clear that this omission does not result from a legislative oversight. Section 3161(d)(1) retriggers the 30- and

Act

Section 3161(h)(6) of the Speedy Trial Act confirms that this distinction is, indeed, a deliberate one. See also note 4, *supra*. That section provides that when an indictment is dismissed upon the government's motion, the period between that dismissal and arraignment upon a subsequent indictment is not to be counted against the 70-day period within which trial must be held. In requiring exclusion of the time when a defendant is not held to answer on any indictment, Congress plainly assumed that the time within which a defendant must be brought to trial on a subsequent indictment is measured from his arraignment on the *original* indictment, subject to the tolling rule created by Section 3161(h)(6). And the courts that have considered the issue have uniformly agreed that reindictment after a voluntary dismissal does not trigger a new 70-day period for trial. Thus, when dismissal is on the government's own motion and there is no gap between dismissal and reindictment (so that Section 3161(h)(6) is not directly controlling), the government's 70-day time limit is computed directly by reference to the date of the original arraignment. See *United States* v. *Bounos*, 730 F.2d 468, 470 (7th Cir. 1984); *United States* v. *Rodriguez-Restrepo*, 680 F.2d 920, 921 (2d Cir. 1982); *United States* v. *Horton*, 676 F.2d at 1170; *United States* v. *Dennis*, 625 F.2d 782, 793 (8th Cir. 1980); cf. *United States* v. *MacDonald*, 456 U.S. 1, 21 n.7 (1982).

70-day time limits upon refiling of charges following dismissal of a *complaint*, regardless of which party is responsible for the dismissal, whereas new time limits are triggered by renewed filing of charges after dismissal of an *indictment* only when the dismissal is "upon motion of the defendant" (18 U.S.C. 3161(d)(1)).

The same rule should apply to the 30-day minimum defense preparation period. *United States* v. *Rush*, 738 F.2d 497, 511 (1st Cir. 1984). The Committee on the Administration of the Criminal Law of the Judicial Conference of the United States has recognized as much in its *Guidelines to the Administration of the Speedy Trial Act of 1974, As Amended*, at 14 (rev. 1979, with Aug. 1981 amendments):

> In the opinion of the Committee, the [defense-preparation] period does not begin to run anew when superseding indictments are filed in circumstances in which the seventy-day time limit is determined by reference to the original indictment or information. See Section 3161(h)(6). Nor does a new thirty-day minimum period begin to run if prosecution is resumed on an original indictment or information following a mistrial, appeal, or withdrawal of a guilty plea. In all of these situations, the trial court should use its scheduling discretion to ensure that the defense has time to prepare in the circumstances of the particular case.[5]

Indeed, unless the 30-day minimum period and the 70-day maximum period for trial begin to run at the same time, a paradox ensues: a timely trial may be impossible where a superseding indictment is returned more than 41 days after filing of the original indictment; in that situation, by the time the 30-day period is allowed to accrue, the 70-day period will have elapsed. Indeed, this case presents precisely the paradox we have noted.[6]

[5] The 1984 revision of these guidelines, which we received just prior to filing of this petition, adds the observation that the Ninth Circuit's interpretation of Section 3161(c)(2) is, in this respect, contrary to the Committee's view. Comm. on the Administration of the Criminal Law of the Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, As Amended*, at 15-16 (rev. 1979, with amendments through Oct. 1984).

b. Although the court of appeals took no notice of this fact, there are two separate provisions in the Act that tend to ensure that defendants will have adequate time to prepare for trial. The first is Section 3161(c)(2), the operation of which is directly at issue here. As we have explained, that section guarantees that, absent an express waiver, a defendant and his attorney will have at least one 30-day period in which to prepare for trial. But in providing for this "automatic" 30-day trial preparation period in 1979, Congress recognized that additional preparation time would be needed in some cases. Thus Congress also amended the Act to permit the district court, in the sound exercise of its discretion, to order an "ends of justice" continuance under Section 3161(h)(8) when needed, inter alia, to afford

[6] The original indictment was filed on February 18, 1983 and respondent was arraigned the same day. Fifty-six days later, the superseding indictment was filed. No pretrial motions were filed in this case and other pretrial proceedings (filing of the indictment and the re-arraignment) that create time excludable from the 70-day Speedy Trial Act time limit under 18 U.S.C. 3161(h) account for only two days. Accordingly, only 16 days then remained in which to commence respondent's trial. Respondent was arraigned on the superseding indictment on April 18, 1983. If respondent had then been given a new 30-day preparation period, his trial could not have begun until May 18, 1983, 17 days after the 70-day time limit had expired. Under the applicable sanctions provision of the Act, 18 U.S.C. 3162(a)(2), respondent would have been entitled to a dismissal of the indictment—albeit not necessarily with prejudice—because his trial was tardy.

defense counsel "reasonable time necessary for effective preparation." 18 U.S.C. 3161(h)(8)(B)(iv); see *United States* v. *Aviles*, 623 F.2d 1192, 1196 (7th Cir. 1980).

The latter provision gives the Act necessary flexibility and will adequately protect a defendant who legitimately needs more time to prepare for trial because of the filing of a superseding indictment (or any other reason), and who makes a properly supported application for such a continuance to the district court. Accordingly, there is no reason to extend the application of the automatic 30-day preparation period beyond the circumstances specified by Section 3161(c)(2).

Superseding indictments are regularly and appropriately employed by federal prosecutors for such purposes as correcting errors in the original indictment (as in this case), conforming the indictment to the evidence expected to be adduced at trial, dropping defendants or counts, and like purposes that often will have no material bearing upon the ability of a defendant who has already had at least 30 days' preparation time to be ready for trial. The requirement created by the Ninth Circuit of an automatic additional 30-day delay in the trial is not only unnecessary to protect defendants' interests, but can cause severe disruption of the crowded dockets of district courts, inconvenience to witnesses, and conflicts among defendants in multi-defendant cases in which some defendants demand a prompt and speedy trial as scheduled while other insist upon an automatic 30-day delay. The Ninth Circuit's rule is at bottom fundamentally inconsistent with the purposes of the Speedy Trial Act, which, as its name implies,

is designed for the expeditious resolution of criminal prosecutions and the avoidance of unnecessary delay in achieving that objective. It should be corrected by this Court.

c. The result reached by the court of appeals is particularly indefensible because of the nature of the change effected by the filing of the superseding indictment in this case. As we have explained (pages 4-5, *supra*), the superseding indictment merely corrected a typographical error as to the date of conviction upon a predicate offense. Respondent and his counsel had every reason to know, from the outset, the correct date of the predicate conviction, and he has never claimed that the typographical error was the cause of any difficulty in preparing for trial.[7] Moreover, it is undisputed that counsel was advised of the correct date of the conviction on the predicate offense long in advance of the scheduled trial date. As the facts of this case highlight, the policy of allowing adequate time for defendants to prepare for trial generally does not require continuance of trial following return of a superseding indictment. It is inconceivable, in light of the purposes of the Speedy Trial Act, that Congress intended rigidly to require an automatic 30-day postponement of trial in these circumstances.

d. As Justice White has observed, *Williford* v. *United States*, No. 83-6814 (Oct. 9, 1984) (dissent from denial of certiorari), the question that is pre-

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[7] In point of fact, neither the original indictment nor the superseding indictment purported to state precisely the date of the predicate conviction. Rather, the original indictment stated that the prior judgment of conviction was entered "on or about December 17, 1981," whereas the superseding indictment substituted the phrase "on or about December 7, 1981" (E.R. 4, 7).

sented here has divided the courts of appeals. The rule developed by the Ninth Circuit conflicts with the decisions of every other court of appeals that has considered the issue. See *United States* v. *Rush*, 738 F.2d 497, 510-511 (1st Cir. 1984) (expressly disagreeing with the Ninth Circuit's decisions in *Arkus* and *Harris*); *United States* v. *Williford*, No. 83-1376 (5th Cir. Feb. 27, 1984), slip op. 3-6, cert. denied, No. 83-6814 (Oct. 9, 1984); *United States* v. *Horton*, 676 F.2d 1165, 1169 (7th Cir. 1982), cert. denied, 459 U.S. 1201 (1983); *United States* v. *Todisco*, 667 F.2d 255, 260 (2d Cir. 1981).[8] In opposing certiorari in *Williford* (83-6814 Br. in Opp. 4-5) we conceded that the decision in this case was irreconcilable with those of other courts of appeals concerning this issue, but noted the pendency of our petition for rehearing with suggestion for en banc review and suggested that this Court should withhold review until it was clear that the Ninth Circuit would adhere to its position.[9] Now that the Ninth Circuit has made

[8] In dissenting from the denial of certiorari in *Williford*, Justice White appeared to suggest that the Fourth Circuit had allied itself with the Ninth Circuit on the question presented here, citing *United States* v. *Wooten*, 688 F.2d 941, 951 (1982). We do not read *Wooten* to address the question at all. The issue in *Wooten* was whether the defense-preparation period is measured by 30 calendar days or whether the period is subject to expansion by periods of excludable delay. 688 F.2d at 949-951. There was no superseding indictment in *Wooten*, and the court did not comment on the applicability of Section 3161(c)(2) to superseding indictments.

[9] Our brief in *Williford* was filed on July 30, 1984. Although the court of appeals denied our rehearing petition in this case shortly before this Court denied certiorari in *Williford*, we were not aware of that fact, and did not become so until we asked the U.S. Attorney to call this Court's action in *Williford* to the attention of the court of appeals in connection with the rehearing petition in this case.

clear its unwillingness to reconsider the issue, further review plainly is warranted. Although several of the courts of appeals have suggested that there might be some circumstances in which a superseding indictment requires a continuance of a trial date (see, *e.g.*, *United States* v. *Rush*, 738 F.2d at 511), it is perfectly clear that the First, Second, Fifth, and Eighth Circuits would have rejected respondent's argument that the Speedy Trial Act was violated here.

2. Even if the defense preparation period requirement of the Speedy Trial Act was violated here, the court of appeals' further ruling (App., *infra*, 2a) that a violation of Section 3161(c)(2) is "per se" reversible error and that respondent accordingly is entitled to a new trial here is plainly erroneous. In *United States* v. *Hasting*, 461 U.S. 499, 509 (1983), this Court reaffirmed "the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations * * *." See 28 U.S.C. 2111; Fed. R. Crim. P. 52(a). The decision below thus is inconsistent with the general rule that any adjudication of error be accompanied by a harmless error analysis.

Nothing in the Speedy Trial Act precludes application of the harmless error rule to violations of Section 3161(c)(2). The Act itself contains a variety of remedial prescriptions, but none of these provides any sanction for violations of Section 3161(c)(2). For instance, Section 3162(a)(1) requires dismissal of pending charges if the arrest-to-indictment time limit established by Section 3161(b) is violated, and Section 3162(a)(2) mandates dismissal of an indictment when a defendant is not brought to trial within the period established by Section 3161(c)(1). (Such dismissals may be with or without prejudice, as the circumstances of the violation and other statu-

tory considerations dictate.) Section 3162(b) prescribes disciplinary sanctions for attorneys who knowingly subvert the purposes served by the Speedy Trial Act. And when a defendant is incarcerated for more than 90 non-excludable days before commencement of his trial, the statute prescribes "automatic review by the court of the conditions of release" as the proper remedy (18 U.S.C. 3164(c)). In light of Congress's failure even to address the sanction to be imposed for violation of 18 U.S.C. 3161(c)(2), it is plainly inappropriate to suppose that Congress meant to abrogate the harmless error rule in this situation.

The Ninth Circuit has itself recognized that the Act does not specify the remedy, if any, for a violation of Section 3161(c)(2). *United States* v. *Daly*, 716 F.2d 1499, 1505-1506 (1983) ("The Act provides no specific guidance as to the appropriate remedy * * * [where a case is tried earlier than is permitted by section 3161(c)(2)]."). But in *Daly*, which the panel in this case followed (App., *infra*, 2a), the court of appeals filled the gap in the statutory language, holding that a new trial is the proper remedy, and apparently excluding consideration of harmless error (716 F.2d at 1506):

> [T]he purpose of section 3161(c)(2) is to insure that defendants are allowed sufficient time to prepare for trial. Consistent with this underlying policy, section 3161(c)(2) essentially establishes that any pretrial preparation period shorter than 30 days is inadequate *per se*. A violation of Section 3161(c)(2) thus should be treated like an erroneously denied motion for a continuance, because both of these procedural errors deny a defendant a fair trial by forcing him into court before he has had adequate time for preparation.

The analogy employed by the court of appeals is faulty and misleading. To be sure, Section 3161(c)(2) reflects Congress's judgment that the specified period of trial preparation time should be permitted by district courts, without regard to whether failure to do so would in a particular case be unfairly prejudicial, or would deny a defendant due process. The automatic feature of Section 3161(c)(2) thus ordinarily makes it unnecessary and inappropriate for the district courts to engage in a fact-sensitive determination as to the defendant's need for time to prepare a defense. Accordingly, it is *error* to deny the 30-day trial preparation period when required by the Act. But it does not follow that such an error may not be harmless.

Nor does the analogy to an "erroneously denied continuance" support the court of appeals' conclusion here. When not directed otherwise by the Speedy Trial Act, trial courts have considerable discretion as to whether a continuance sought by a defendant should be granted. See *United States* v. *Cronic*, No. 82-660 (May 14, 1984), slip op. 13. Thus, a ruling on the merits that discretion has been abused and that denial of a continuance was therefore "erroneous" necessarily imports a determination that the ruling, and thus the error, was prejudicial. On the other hand, precisely because a violation of Section 3161(c)(2) does not depend upon any showing of prejudice, finding such a violation does not rule out the possibility of harmless error. To be sure, an appeal based on a violation of Section 3161(c)(2) does not require the defendant affirmatively to demonstrate prejudice flowing from the curtailment of pretrial preparation time. But this does not prevent the government from shouldering the burden of demonstrating harmless error.

Assuming that the government may avoid reversal by successfully carrying the burden of establishing harmless error under Section 3161(c)(2), the error in this case must be deemed undeniably harmless. As we have explained above (page 15), there is no conceivable basis for claiming (and respondent has never claimed) that the typographical error in the original indictment in any way impeded his trial preparation, or that the return of the superseding indictment correcting that error, which had affirmatively been disclosed to respondent almost a month earlier, disrupted that preparation. Accordingly, respondent, who was afforded 60 days of preparation time from arraignment to trial, suffered no possible injury from any technical violation of the Act that may have occurred here.[10] Thus any such violation should have been deemed harmless and the respondent's conviction should have been affirmed.

3. The rule developed by the court of appeals and applied in this case will have a considerable adverse effect on the administration of the criminal law

[10] As the government observed in the court of appeals, it is well-settled in the Ninth Circuit that an indictment may be "amended" to correct typographical errors, without resubmitting the case to the grand jury for reindictment. See, *e.g.*, *United States* v. *Dawson*, 516 F.2d 796, 801 (1975); *United States* v. *Buble*, 440 F.2d 405, cert. denied, 404 U.S. 828 (1971); *Heisler* v. *United States*, 394 F.2d 692, cert. denied, 393 U.S. 986 (1968). Even had there been no actual amendment of the indictment by the court, trial on the original indictment would have involved at most an immaterial, and therefore non-prejudicial, variance between the indictment and the proof that would not have justified setting aside respondent's conviction. It is no answer, at least in the context of a harmless error analysis, to observe, as the court of appeals did, that the government is bound by its decision to seek reindictment.

within the Ninth Circuit. We have already noted that it may make it difficult or impossible to avoid Speedy Trial Act violations in an important category of cases. But even where that problem does not exist, the court of appeals' interpretation of the Act will disrupt the management of heavily burdened district court dockets by throwing cases off the calendar whenever a superseding indictment is returned, even when there is no legitimate need for a continuance. Moreover, the filing of superseding indictments relatively late in the pretrial period is an ordinary and natural consequence of pretrial proceedings that focus or limit the charges to be tried. Defendants, prosecutors, the courts, and the public interest would be disserved if an artificial impediment to filing of superseding indictments were created; yet that may well be the practical effect of the court of appeals' decision. Accordingly, the decision of the court of appeals ought not go unreviewed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1984

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83-5089

DC No. CR 83-0162-K

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

FERNANDO ROJAS-CONTRERAS, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Southern District of California
Judith N. Keep, District Judge, Presiding

Submitted January 3, 1984**
[Filed Mar. 2, 1984]

MEMORANDUM*

Before: TANG, FERGUSON and BOOCHEVER, Circuit Judges.

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* The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of the Ninth Circuit for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter*, and that this memorandum may not be cited to this court as precedent.

** The panel unanimously agrees that this case is appropriate for submission without oral argument.

Rojas-Contreras appeals his conviction of felony illegal reentry on the ground that the district court erred in denying his request for a thirty-day continuance under the Speedy Trial Act, 18 U.S.C. § 3161 (c) (2), after Rojas-Contreras was arraigned on a superseding indictment. We agree and therefore reverse his conviction.

In *United States v. Harris*, No. 83-5051, slip op. at 562 (9th Cir. Feb. 3, 1984), we held that section 3161(c) (2) of the Speedy Trial Act guarantees that a defendant will not be forced to trial less than thirty days from the date on which the defendant first appears on the indictment on which the defendant ultimately goes to trial. Rojas-Contreras was thus entitled to an additional thirty-day preparation period after he was arraigned on the superseding indictment. Further, any pretrial preparation period shorter than thirty days is inadequate *per se*. No showing of prejudice is required. *Id.*; *United States v. Daly*, 716 F.2d 1499, 1506 (9th Cir. 1983) ("A violation of section 3161(c) (2) thus should be treated like an erroneously denied motion for a continuance, because both of these procedural errors deny a defendant a fair trial by forcing him into court before he has had adequate time for preparation.").

The government's argument that the original indictment may have been amended without resubmitting the case to the grand jury is immaterial. It was the government who chose to proceed by way of reindictment.

Rojas-Contreras was forced to trial less than thirty days after he was arraigned on the superseding indictment in violation of the Speedy Trial Act. His conviction is

REVERSED.

APPENDIX B

[Tr. 23-25]:

THE COURT: Let me point out to you that, number 1, the way I read Arcus is that essentially, well, essentially the Speedy Trial Act itself says something to the effect that absent a waiver no trial may commence within 30 days of the defendant's first appearance by counsel.

Now, in the language in Arcus that this talked about the fact that they can't have [trial] within 30 days of the indictment without express waiver, and then they do in fact talk about in this particular case the fact that the first indictment be dismissed, delay before the second one, et cetera.

The factual distinction that I see is, and I am rather relying on the Seventh Circuit, regardless of whether you believe that your old presiding judge's concurring opinion is correct or not. The point is to make sure that the defendant is not forced to trial too fast; yet, on the other hand, the Speedy Trial Act is my guidelines, my rules as to when I would have to get a defendant to trial.

In fact, the first issue before the Court is whether or not there is any prejudice that has been shown by virtue of him going to trial on the superseding indictment on which he was just arraigned this morning. In other words, is the change of date in Count 1 so significant and causes a significant problem. I see none.

To the extent that it appears that the discovery was very clear, the date that was being discussed is the date of the indictment, and therefore certainly the basis for their felony, and the prior act was clear from the discovery and clear from the inception. So

it was a ministerial act to correct a date error where a "1" had been inserted in error, and that has been corrected by the superceding indictment. So I find that there has been no change—I mean, no prejudice from the superceding indictment.

Then the question is, looking at Arcus and looking at the Seventh Circuit's case that was decided, in this particular case there was an overlap. That was arraigned on the superceding indictment this morning, and the original indictment was dismissed. He has been in custody since the date, I believe, of his arrest, which was what, according—

MR. CLEARY: I think 13 February, Your Honor.

THE COURT: 13 February 1983; therefore we don't have a situation like Arcus where the case was dismissed, the individual is out, and presumably free, and the counsel is not preparing. He's going on with other business. But rather it is a matter of in this case there's been this trial date set, and there's been the constant contact between counsel and the defendant since his arrest.

The second thing that I see, then, is on the issue of prejudice. What is being discussed with the court really doesn't have to do with changing the indictment at all, but the fact that the "A" file has not been prepared. * * *

* * * * *

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-5089

DC No. CR 83-0162-K

Southern California

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

FERNANDO ROJAS-CONTRERAS, DEFENDANT-APPELLANT

[Filed Sept. 26, 1984]

ORDER

Before: TANG, FERGUSON and BOOCHEVER, Circuit Judges.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing.

The full court has been advised of the suggestion for an en banc hearing and a judge in active service requested that a vote be taken on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

Upon vote of the eligible judges in active service, a majority failed to vote for an en banc rehearing.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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